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In The

Supreme Court of the United States

October Term, 1983

No. 83-1780

AARON MARK ZIMMERMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS And REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, THE ONONDAGA COUNTY BAR ASSOCIATION

HENRY S. FRASER
Counsel for Respondent, The Onondaga County Bar Association
499 South Warren Street
Syracuse, New York 13202
Tel. (315) 475-8461

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The respondent, The Onondaga County Bar Association, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second

Circuit's judgment and opinion in this case. That opinion is reported at 726 F.2d 85. *(Zimmerman v. Grievance Com. of Fifth Jud. Dist.)*

Although the petition refers repeatedly to the New York Appellate Division's opinion in this case censuring the petitioner *(Matter of Zimmerman,* 79 AD2d 263), no copy thereof is appended to the petition. We have therefore, for ready reference, reproduced the said opinion at the end of this brief.

The petitioner has misconceived and misstated the "Questions Presented." The actual question is one of jurisdiction, namely: Did the U.S. District Court lack subject-matter jurisdiction. Both the District Court and the U.S. Court of Appeals held that such jurisdiction did not exist, citing the recent decision of this Court in *District of Columbia Court of Appeals v. Feldman,* —U.S.—, 103 S. Ct. 1303.

There are moreover a number of important omissions, and indeed some distortions, in the petitioner's "Statement of the Case," which we shall note below.

STATEMENT OF FACTS

The Appellate Division, Fourth Department, of the New York Supreme Court censured the petitioner because he advertised in the "yellow pages" of the Syracuse telephone directory for the year 1980-1981 that he practiced in each of the 25 areas of law listed in the advertisement appearing under the caption "Lawyers Grouped by Practice." *(Matter of Zimmerman,* 79 AD2d 263) In his written answer to the grievance complaint Mr. Zimmerman admitted that he had no experience whatever in several of the said categories of law practice. The Appellate Division held that his conduct violated the officially promulgated rule

of the court (22 NYCRR 1022.16 [a]) forbidding a lawyer to use or participate in the preparation or dissemination of any public communication containing statements or claims "that are false, deceptive, misleading or cast reflection on the legal profession as a whole." (The entire advertisement is reproduced at page 267 of 79 AD2d. See also last page of appendix to this brief.)

Contrary to the assertion in the petition that the Appellate Division censured Mr. Zimmerman for purchasing listings in the grouped-by-practice section of the yellow pages, the Court explicitly censured him for representing to the public that he practiced in various fields of law wherein he had never practiced.

After an appeal to the New York State Court of Appeals had been dismissed upon the ground that no substantial constitutional question was directly involved (53 NY2d 937), and after denial of a subsequent application for permission to appeal to that Court (54 NY2d 606), Mr. Zimmerman took no step to seek review by the Supreme Court of the United States. This he could have done but instead he commenced an action in the U.S. District Court, Northern District of New York.

The District Court held that it lacked subject-matter jurisdiction, and this determination was unanimously affirmed by the Second Circuit. (726 F.2d 85). Both courts held that the case is governed by *District of Columbia Court of Appeals v. Feldman.* (—U.S.—, 103 S. Ct. 1303)

REASONS WHY THE WRIT SHOULD BE DENIED

As the *Feldman* case demonstrates, the petitioner had a remedy, after the New York courts had finally

determined his case, namely to seek relief from the Supreme Court of the United States. This was his sole remedy and he did not pursue it. He did not have an election at that point to start a new action in the U.S. District Court.

In the next place, there is no basis whatever for the petitioner's claim that the decision of the Appellate Division constituted the promulgation of a new "rule" to which, he says, he is now entitled to make a "general challenge" in the Federal courts. The proceeding in the State court was judicial in nature, adjudging that the pre-existing official rule, dealing with deceptive or misleading advertising by lawyers, had been violated by Mr. Zimmerman. The decision of the Appellate Division, styled a "rule" by Mr. Zimmerman, does not yield itself to such a transformation. This decision formed an integral part of a judicial, not a legislative, proceeding, and constitutes but one of a variety of judicial opinions interpreting and applying, case by case, the official rules relating to advertising by lawyers.

Nor is there any "important constitutional issue." The petitioner is free to advertise in the yellow pages, or elsewhere, as long as the advertisement is not misleading, or false or deceptive.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY S. FRASER
Counsel for Respondent,
The Onondaga County Bar Association
499 South Warren Street
Syracuse, New York 13202
Tel. (315) 475-8461

APPENDIX

MATTER OF ZIMMERMAN [79 AD2d 263]

In the Matter of AARON MARK ZIMMERMAN, an Attorney, Respondent. OFFICE OF GRIEVANCE COMMITTEES, Petitioner.

Fourth Department, February 18, 1981

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Fifth Judicial District. Respondent was admitted to the Bar on September 12, 1977, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings

An attorney who advertised in the yellow pages of the telephone directory that he practiced in each of the 25 areas of law listed alphabetically violated Disciplinary Rule 2-101(A) of the Code of Professional Responsibility, which provides that a lawyer shall not use or disseminate any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole; the potential for deception was created by the advertisement and respondent attorney's listings were deceptive and misleading. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

APPEARANCES OF COUNSEL

David E. Brennan (Paul J. Ginnelly of counsel), for petitioner.

Sugarman, Wallace, Manheim & Schoenwald (Donald Schoenwald of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to practice as an attorney and counselor at law in the State of New York on September 12, 1977. The Grievance Committee for the Fifth Judicial District charged in its petition instituting this disciplinary proceeding that respondent advertised in the Yellow Pages of the New York Bell Telephone Directory for Syracuse, New York for the year 1980-1981 that he practiced in each of the 25 areas of law listed alphabetically in the advertise-

ment which appeared under the caption "Lawyers Grouped by Practice" and that this conduct appears to violate DR 2-101(A) of the Code of Professional Responsibility and subdivision (a) of rule 1022.16 of the Appellate Division, Fourth Department (22 NYCRR 1022.16[a]). According to the petition, respondent admitted that "he has had no experience at all in several of these categories of law".

By this answer respondent admitted the material allegations of the petition, but denied that he either intended to violate or, in fact, violated the Code of Professional Responsibility. Respondent's answer details the methods adopted by the telephone company in obtaining his listing in the "various categories where he was willing to accept clients who came to him with problems", and asserts that he is associated with a well-established law firm to whom he could turn for assistance and that at the time he purchased the advertisement he did not feel that his conduct was improper. He claims that the guidelines and rules set forth in DR 2-101(A) are "vague, ill-defined", and that he had no intention to mislead or deceive. The parties conceded that no order of reference was required.

We find that respondent violated DR 2-101(A) of the Code of Professional Responsibility and the rules of this department (22 NYCRR 1022.16[a]).

DR 2-101(A) of the Code of Professional Responsibility provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole." Our department rule, effective March 1, 1978 entitled "Advertising by attorneys", is identical to DR 2-101(A).

An examination of the advertisement, a copy of which is attached to the petition and annexed hereto as Appendix A, reveals that its publisher divided the practice of law into 25 separate categories under each of which respondent's name appears first: his name is listed alphabetically by his given name, Aaron, rather than by his surname, Zimmerman. Under the advertisement's caption appears the follow-

ing legend: "Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers".

Commercial speech in the form of truthful advertising of legal services, designed to disclose information to permit a consumer to reach an informed decision and to identify the legal services he desires, serves individual and societal interests and while it may be regulated by the State it may not be proscribed (*Bates v State Bar of Arizona*, 433 US 350; see, also, *Matter of Primus*, 436 US 412; *Matter of Koffler*, 51 NY2d 140). Further, a lawyer is permitted publicly to identify one or more areas of law in which he practices, but he may not hold himself out as a specialist in a particular field of law, since no lawyer certification procedure or rules have been established in New York State (Code of Professional Responsibility, DR 2-105).

The advertisement itself makes no overt claim as to the quality of legal services that may be provided. The ambiguous caveat or disclaimer of the advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists or that certification is available. Read as a whole, it cannot be gainsaid that the advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed. If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed. Respondent's claim that he is associated with a well-established law firm which can assist him is of no avail because it is his listing, not that of his law firm, which is under review. This claim merely emphasizes the deceptive and misleading nature of the entire advertisement since it is he, not his law firm, who is holding himself out to the public.

The disciplinary rule under review is directly concerned with the prevention of deception: a legitimate State interest which the regulation seeks to protect. The thrust of the regulation is honest public communication so that "the stream of commercial information [may] flow cleanly as well as freely" *(Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748, 772). No detailed guideline or signpost other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of such an advertisement is to gain clients by guile and delusion. Measuring the conduct of the respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisment and respondent's listings were deceptive and misleading. The holding by the Court of Appeals in *Matter of Koffler* (51 NY2d 140, *supra)* does not require a contrary conclusion. There it was held that direct-mail solicitation of potential clients is constitutionally protected commercial speech. We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise, to prospective clients. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

DILLON, P. J., CALLAHAN, DOERR, DENMAN and SCHNEPP, JJ., concur.

Motion to strike paragraph ninth of the petition granted. Order of censure entered.

LAWYERS
Grouped By Practice
Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers.
Guide

ACCIDENTS-PERSONAL INJURY PROPERTY DAMAGE

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ANTI-TRUST & TRADE REGULATION

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LANDLORD & TENANT

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SECURITIES LAW

TAXATION

TRIAL PRACTICE

WILLS, TRUST & PROBATE ESTATES

WORKMEN'S COMPENSATION